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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,
Petitioner,
v.
BE&K CONSTRUCTION COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

REPLY BRIEF FOR PETITIONER

JOHN T. DECARLO
DANIEL J. HALL
DECARLO, CONNOR & SELVO
500 South Virgil Avenue
Los Angeles, CA 90020

ANDREW D. ROTH
DAVID M. SILBERMAN
LAURENCE GOLD *
BREDHOFF & KAISER, P.L.L.C.
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

* Counsel of Record

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REPLY BRIEF FOR PETITIONER

ARGUMENT

A. *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945), and its progeny, stake out a coherent and consistent body of "specific jurisdiction" Due Process Clause law to govern cases in which a legal entity—be it a corporation or an unincorporated association—is sued in a State to redress a wrong alleged to have been committed within that State.

The thesis of our *certiorari* petition is that, in contrast, fifty years after *International Shoe's* guarded suggestion that the Due Process Clause may allow for suits, like the instant one, on claims which arise wholly *outside* the forum State, the "general jurisdiction" law is incoherent and inconsistent.

International Shoe, as we showed, was itself a specific jurisdiction case which contains only a single paragraph of *dictum* addressing general jurisdiction. And, the only two successor general jurisdiction cases in this Court were decided in narrow, fact-specific terms.[1] As a result, this Court's precedents have not proved sufficient to guide the lower courts in making the threshold determination of when the assertion of general jurisdiction is constitutionally proper and how that determination is to be made. There is in consequence an ever-expanding line of state and federal appellate court decisions that quote the same words from *Perkins* or *Helicopteros* but that cannot be reconciled in their understanding of those words, in their rules of decision, or in their ultimate holdings. Pet. 7-25.

Respondent BE&K Construction Co. ("Respondent") sees the general jurisdiction world in a Panglossian way. This Court, says Respondent, did all that can be done to bring order by stating in *Helicopteros* that "[w]e thus must explore the nature of [the] contacts with the [forum]

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[1] *Helicopteros Nacionales de Columbia v. Hall,* 466 U.S. 408 (1984); *Perkins v. Benguet Mining Co.,* 342 U.S. 437 (1952).

State . . . to determine whether they constitute the kind of continuous and systematic general business contacts the Court found to exist in *Perkins*." 466 U.S. at 415-16. Post-*Helicopteros,* there is, Respondent asserts, "remarkable continuity among the lower federal courts and state courts," in that the "state courts and lower federal courts have consistently applied this standard to cases involving issues of general jurisdiction." Resp. Br. at 5-6. The conflicting conclusions reached in the lower court cases, says Respondent, reflect nothing more than "the inevitable variety that results when a single standard is applied to a plethora of factual situations." Resp. Br. at 6. And, the decision below in the instant case—permitting the Alabama courts to exercise general jurisdiction over the United Brotherhood of Carpenters and Joiners of America ("Petitioner" or "the Union") essentially because the Union has a small number of affiliated organizations and members, as well as one employee, in Alabama—is, in Respondent's view, consistent with the Due Process Clause and with this "remarkabl[y] continu[ous]" body of lower court law. *Id.*[2]

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[2] Respondent does claim in this regard that there is more here by way of facts to support general jurisdiction than our *certiorari* petition acknowledges. Resp. Br. at 3. But the additional facts Respondent recites do not by an iota change the nature of this case or of the general jurisdiction issue presented.

Respondent notes first that in the year prior to the filing of this lawsuit, the Union paid $50,000 in funeral benefits on behalf of Alabama members; second, that the Union, through its one employee located in Alabama, has "directed and/or supported pro-union activities at Alabama jobsites" presumably in support of the Union's 2,584 Alabama members; and third, that the Union has "negotiated several labor agreements with Alabama employers" also presumably on behalf of its Alabama members. Resp. Br. at 3. But these limited activities within the State prove nothing more than that the Union provided some services in the State to its resident members which is precisely what would be expected of *any* national organization which has membership in a State.

Equally to the point, the record shows how small a part of the Union's overall operations its Alabama activities were. The $50,000 in death benefits paid out to the families of Alabama members, for

Respondent's argument fails on two separate grounds.

1. Respondent's brief rests on a most superficial—we would say trivial—test of, and proof for, consistency: general jurisdiction decisions that recite a " 'continuous and systematic' contacts with the forum State" standard are by definition consistent with the Due Process Clause and with each other; that being so, nothing else about the decisions—the factual context, the rationale, or the holding—is relevant to the consistency calculus. On this approach, Respondent makes 16 lower court cases consistent with the Alabama cases and with each other simply by citing to the page in the court opinions where the words "continuous and systematic" appear. Resp. Br. at 4-6.

That theory of consistency cannot survive a moment's more searching review of the cases.

- In *Ex parte Newco Mfg. Co.*, 481 So. 2d 867 (Ala. 1985)—the leading Alabama general jurisdiction decision and the decision on which the court below based its holding in the instant case—the Alabama Supreme Court held that the Due Process Clause permitted the Alabama courts to exercise general jurisdiction over a Missouri-based company which had engaged in an allegedly wrongful transaction in Maryland on the ground that the company in question sold between $65,000 and $85,000 worth of goods in Alabama each year through an independent distributor and the mails.

  In contrast, in *Nichols* v. *G.D. Searle & Co.*, 991 F.2d 1195 (4th Cir. 1993), to cite just one example, the Fourth Circuit held that general jurisdiction was constitutionally precluded even though G.D. Searle & Company employed between 17 and 21 representatives plus a resident manager within the forum State and had sales of between $9.0 and $13.0 million in that State.

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example, represents under 1% of the total death benefits paid by the Union in the year in question. And the 21 Alabama project agreements which the Union negotiated during the two years preceding the filing of this suit were a mere .37% of all such agreements entered into by the Union during that time period.

- In *Braband v. Beech Aircraft Corp.*, 72 Ill. 2d 548, 382 N.E. 2d 252 (1978), *reaffirmed in Maunder v. DeHavilland Aircraft,* 102 Ill. 2d 342, 466 N.E. 2d 217, 222 (1984), the Illinois Supreme Court asserted general jurisdiction over Beech Aircraft based on Beech's sales activity in Illinois through one independent distributor.

  Yet in *Bearry v. Beech Aircraft Corp.*, 818 F.2d 372 (5th Cir. 1987), the Fifth Circuit held that Texas could not constitutionally exercise general jurisdiction over Beech even though there were 17 independent dealers in Texas selling Beech's products and Beech made $250 million in Texas sales over a five-year period.

- In the instant case, the Alabama Supreme Court sustained general jurisdiction over the Union based upon the existence of ten affiliated local unions with approximately one half of one percent of the Union's members.

  Yet in *Lewron Television, Inc. v. International Alliance of Theatrical Stage Employees,* 378 A.2d 728 (Md. Ct. Spec. App. 1977), the court held that the national union in that case could not be sued in Maryland even though the union there had two locals in the State with approximately one half of one percent of the union's members.

By any measure—other than Respondent's tendentious one—these decisions are in conflict with each other. There simply is no room for doubt that the court that held general jurisdiction proper in *Ex parte Newco Mfg.* and in the instant case would likewise have exercised general jurisdiction over G.D. Searle and Beech Aircraft, and that, conversely, the courts that found a constitutional bar to general jurisdiction over those defendants would not have allowed general jurisdiction in *Newco* and in this case. And, it is equally plain that the Alabama Supreme Court would have found general jurisdiction to be proper over the national union in *Lewron,* whereas the *Lewron* court would not have allowed general jurisdiction here.

While Respondent blithely asserts that these results reflect nothing more than "a plethora of factual situations," Resp. Br. at 6, Respondent fails to identify even a single fact that is present here (or that was present in *Newco*) to justify the divergent results.

The short of the matter is that the rule of law requires courts to do more that merely recite a set of facts, state a legal standard, and then announce a result. Principled decisionmaking requires legal standards that are sufficiently particularized so as to assure that like cases will be decided alike. For that reason, this Court's role in constitutional adjudication has never ended—and could not end—with the formulation of wholly abstract constitutional standards, like "continuous and systematic contacts," that are susceptible to many meanings. Rather, the process of constitutional decisionmaking in this Court has continued through the elaboration of such standards in terms sufficiently concrete to guide the decision of individual cases. That is precisely what is needed with respect to the general jurisdiction law.

2. The chaos in the lower court general jurisdiction law is not just a matter of irreconcilable results. Rather, as we showed in the *certiorari* petition, those results, not surprisingly, reflect divergent understandings among the lower courts as to the governing rule of law. Pet. 13-25. Respondent's contrary contention does not withstand analysis.

(a) Respondent's starting point in constructing its consistency theory is that "[i]n *Helicopteros,* the Court indicated that the *International Shoe* benchmark would be satisfied in the general jurisdiction context when the defendant has 'continuous and systematic' contacts with the forum state." Resp. Br. at 4-5. That is, indeed, how some courts—including the Alabama Supreme Court—have read this Court's cases. But what *Helicopteros* actually says, in the very passage Respondent quotes, is quite different: "[w]e thus must explore the nature of [the] contacts with the State . . . to determine whether they constitute *the kind of continuous and systematic general*

business contacts the Court found to exist in Perkins." 466 U.S. at 415-16 (emphasis added).

Several courts, including most notably the Fifth Circuit and the Ninth Circuit, have focused on these words of limitation and have read *Helicopteros* to require not just "continuous and systematic contacts," but rather "continuous and systematic *general business contacts* . . . of the kind . . . found to exist in *Perkins.*" *See* Pet. 22-23. Indeed, the Ninth Circuit has expressly stated that it views the *Perkins* decision—the only decision in this Court upholding general jurisdiction—as "limited to [*Perkins*'] unusual facts," and the Ninth Circuit therefore "regularly ha[s] declined to find general jurisdiction even where the contacts were quite extensive." *Amoco Egypt Oil Co. v. Leonis Nav. Co.*, 1 F.3d 848, 851 n.3 (9th Cir. 1993).

Significantly, Respondent makes no attempt to do business with these cases or to harmonize the standard applied therein with the standard applied by the Alabama Supreme Court in this case. By its silence, then, Respondent tacitly concedes—as it must—the existence of a conflict over whether the general jurisdiction doctrine is limited to "the kind of continuous and systematic general business contacts the Court found to exist in *Perkins.*"

(b) Respondent focuses its fire on our claim that, even among those courts which read *Helicopteros* to establish a " 'continuous and systematic' . . . contacts" standard, there are disagreements as to what that standard means. Thus, for example, Respondent denies that some courts (including the Alabama Supreme Court) will uphold general jurisdiction based on any recurring—as opposed to sporadic—activities of the defendant in the forum State whereas other courts require extensive in-state activities to support general jurisdiction. "The problem with this contention," says Respondent, "is that a number of cases in the 'Alabama group' use the term 'substantial' as part of the analysis of the defendant's contacts with the forum state," whereas "at least one of the cases" cited in the *certiorari* petition as illustrating a more demanding standard "fails to use the term." Resp. Br. at 8.

But, of course, our point is *not* that it is proper to attach "talismanic significance," Resp. Br. at 8, to the word "substantial," *id.*, but rather to show that—regardless of the form of words used—there is a group of state courts which understand "continuous and systematic contacts" to encompass *any* recurring, in-state activity (including business activity involving as little as $2,000 a year in sales), whereas there is another group that looks at the *magnitude* of the in-state activity to determine the constitutionality of exercising general jurisdiction. And, the decisions, if looked at as more than mere citations, show just that.

Similarly, Respondent contends that our "suggestion that some courts go even further to require that substantiality be determined by looking to the proportion of the defendant's activities in the forum state as against its activities elsewhere is wrong." Resp. Br. at 8. According to Respondent, none of the cases we cited "even suggest[] that this particular factor is controlling." *Id.* Once again, Respondent's attempt to fix attention on abstract verbal formulations does nothing but mislead. The holdings of the courts denying general jurisdiction in cases involving in-state sales activity in the millions of dollars can only be understood, as the opinions show, as resting on the courts' stated recognition that the activity, while substantial in itself in some sense, is insubstantial in proportion to the defendant's overall activities.

(c) In a variation on the same theme, Respondent notes that the Alabama Supreme Court in this case, the Second Circuit in *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560 (2d Cir.), *cert. denied*, 117 S. Ct. 508 (1996), and other courts in other cases we cited, have embraced some form of a two-prong "sufficient contacts/reasonableness" test for general jurisdiction and that this similarity renders "most surprising" our contention that the Second Circuit has developed " 'a very different inquiry for determining the constitutionality of the exercise of general jurisdiction' " than the Alabama Su-

preme Court and the other courts of appeals. Resp. Br. at 9 (quoting Pet. 23).

Our contention is "surprising" only if all two-prong general jurisdiction tests are the same in terms or in substance. Of course, as the *certiorari* petition shows, those tests are *not* the same in either regard. No court, other than the Second Circuit, has suggested the combination of a "minimum contacts" threshold (with the burden of proof on the plaintiff) and a five "reasonableness" factor second prong (with the burden on the defendant to make a "compelling" unreasonableness case). *See* Pet. 23-25. And, as the Second Circuit recognized in constructing that novel test, "[t]he two leading Supreme Court cases"—*Perkins* and *Helicopteros*—provide only "a useful starting point for our analysis," 84 F.3d at 571, and the lower courts have embraced and applied "various approaches" in their ongoing effort to find their way past that starting point, *id.* at 572.[3]

B. We ended our Petition by stressing the importance of the question presented herein, both in practical and doctrinal terms. Pet. 25-29. When all is said and done, under the decision below and *Ex parte Newco Mfg.*—and the decisions of the numerous other state courts following the same approach—a corporation which does nothing more than make lawful sales in a State, or an unincorporated membership association which does nothing more than lawfully enroll members in the State, opens itself up

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[3] Respondent deems it significant here that *certiorari* was denied in *Metropolitan Life*. But even if, *arguendo*, the denial of *certiorari* in another case somehow could be deemed a relevant "precedent," we would note that: (1) in *Metropolitan Life* the Second Circuit concluded that general jurisdiction was not proper based upon the second prong of its two-prong test; and (2) the petition for *certiorari* was filed by the plaintiffs who, not surprisingly, did *not* raise before this Court the conflict among the lower courts on the threshold question of what contacts are sufficiently "continuous and systematic" to establish the constitutional predicate for general jurisdiction. Thus, it is simply not true, as Respondent here asserts, Resp. Br. at 7, that the *Metropolitan Life* petition raised the "same issue" as the instant petition.

to suit in the State with respect to claims arising against the corporation or membership organization anywhere in the world. And, that is true regardless of how limited the entity's activities are in the forum State, and how lawful those activities are and have always been.

For national corporations, and national membership associations, the upshot of the "Alabama group" rule is that such entities can always be sued by a putative plaintiff in the plaintiff's home State, or in any of the other 49 States in which a plaintiff finds the procedures or the climate advantageous, even where the plaintiff's injury occurred thousands of miles from the State in which suit is filed in some other jurisdiction in which the plaintiff voluntarily had chosen to do business. The instant case starkly illustrates the point, and starkly illustrates how far the Alabama group rule departs from the "traditional conception of fair play and substantial justice" which Due Process requires, *International Shoe*, 326 U.S. at 320.[4]

Respondent does not join issue with us in this regard, or endeavor to defend, in principle, the decision below.

Instead, Respondent closes by urging the Court to deny *certiorari* on the ground that, in Respondent's view, the Alabama Supreme Court could have rested its decision on the basis of specific jurisdiction. According to Respondent, "[n]either the trial court nor the Supreme Court of Alabama reached the question of the existence of specific jurisdiction" and therefore, Respondent claims, "[t]o grant a petition for certiorari in such a circumstance would be a waste of this Court's limited resources." Resp. Br. at 10. Respondent's premise and conclusion are equally flawed.

First, it is disingenuous for Respondent to state that the question of specific jurisdiction was not "reached"

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[4] Respondent chose to initiate this tort suit in Alabama even though the conduct giving rise to the suit had taken place in Minnesota, and had been the subject of extensive criminal, civil and administrative proceedings in Minnesota, including civil and administrative proceedings which Respondent itself had initiated in Minnesota.

below. This case began as a suit against five union defendants. Respondent's sole basis for asserting jurisdiction over three of the union defendants was *specific* jurisdiction, and it asserted *both* specific *and* general jurisdiction over the Petitioner herein.[5] The trial court dismissed the complaint against the three union defendants as to whom Respondent had claimed only specific jurisdiction, and sustained the complaint against the Petitioner *solely* on the ground of general jurisdiction. Thus, the fairest reading of its decision and order is that the trial court *rejected* Respondent's specific jurisdiction claim. And, while the Alabama Supreme Court did not discuss this issue, that is only because Respondent did not argue specific jurisdiction as an alternative basis for decision. Thus, it is far from clear that the specific jurisdiction issue is even open at this stage of the proceeding.

Second, and in any event, the fact of the matter is that the court below decided this case *solely* on general jurisdiction grounds. Thus, this case squarely and cleanly presents the general jurisdiction question stated in the *certiorari* petition in a manner that provides the Court every opportunity to clarify the governing law on this important and recurring constitutional question.

CONCLUSION

For the foregoing reasons, and those stated in the Petition, the petition for a writ of *certiorari* should be granted.

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[5] The fifth union defendant, the United Paperworkers International Union, did not assert a jurisdictional defense below but rather moved for dismissal on state law *forum non conveniens* grounds.

Respectfully submitted,

JOHN T. DECARLO
DANIEL J. HALL
DECARLO, CONNOR & SELVO
500 South Virgil Avenue
Los Angeles, CA 90020

ANDREW D. ROTH
DAVID M. SILBERMAN
LAURENCE GOLD *
BREDHOFF & KAISER, P.L.L.C.
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

* Counsel of Record